



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

COPY

AUG 10 1980

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Coordination of Corrective Action Through Permits and Orders

FROM: Susan E. Bromm, Director
RCRA Enforcement Division

Joseph Carra, Director
Permits and State Programs Division

TO: Waste Management Branch Chiefs, Region I-X

An increasing number of RCRA facilities are becoming subject to both §3008(h) orders and §3004(u) permit requirements at facilities where the orders were issued prior to permit issuance. This memorandum is intended to provide guidance on how to coordinate permit and order requirements for corrective action in these situations.

The issuance of a permit requiring corrective action to a facility does not absolve an owner/operator of any responsibility to comply with an order for corrective action previously issued to the facility. The facility owner/operator must comply with both the permit and an existing order. Hence, coordination between the two is essential.

Although §§3008(h) and 3004(u) both authorize the Agency to require clean-up of releases at operating facilities, the distinctions between the two authorities should be considered when issuing or modifying a permit, or amending an order. The §3008(h) order authority authorizes the Agency to require corrective action at RCRA interim status facilities or those that should have had interim status, prior to the issuance or denial of permits. Prior to issuing a permit to a facility subject to a §3008(h) order, the Region must make a decision whether to incorporate the terms of the order into the permit by reference, incorporate the terms directly into the permit and terminate the order, or require the respondent to comply with the separate terms of the order and the permit. If not terminated, the order

continues in effect, according to its terms, past the point of permit issuance for the facility. If a change in the corrective action requirements becomes necessary at a facility subject to a separate permit and an order, the Region should determine whether an amendment to an order or a permit modification will effectuate a change in the corrective action cleanup more efficiently. Because it is impossible to anticipate every scenario where both a permit and an order are in effect at a facility, it is important to be cognizant of the distinctions between the authorities, and make the determination about which vehicle is more appropriate in light of the facts surrounding each case. Of course, a §3008(h) order cannot be issued to a facility after final disposition of the permit application. Also, after §3004(u) has been triggered, modifications to an order may be limited only to those additional requirements needed to effectively implement cleanup of releases already covered by the order. To the extent that modifications to an existing order are made, the Region must ensure that no conflict with permit conditions will be created.

Section 3004(u) authorizes corrective action only with respect to a release from a solid waste management unit. However, please note that if a release cannot be attributed to a unit, the omnibus authority in §3005(c)(3) can be used as authority for permit conditions that address corrective action for that release, provided that the Region can demonstrate that the conditions are necessary to protect human health and the environment. In order to establish the basis for issuing a §3008(h) order, the Agency need only establish that there has been a release of "hazardous waste" as defined under §1004 from the facility. Therefore, once it has been established that a release attributable to the facility has occurred, it is not necessary to determine that a "unit" is the source of the release prior to issuing an order for corrective action.

The regulations require EPA to provide the public with an opportunity to comment on proposed permit conditions, including corrective action provisions. The processes prescribing the requirements for public participation are set forth at 40 CFR 124.10 -.19. An OSWER directive, "Guidance for Public Involvement in RCRA Section 3008(h) Actions," sets forth the requirements for public involvement in the order issuance process and reiterates EPA's commitment to providing meaningful opportunity to the public to be informed of and participate in decisions that affect them and their communities.

As previously stated, the Agency is not required to integrate the requirements of the order into the permit to ensure

the respondents continued compliance with the corrective action requirements. Regions should require facility owners/operators to comply with both the permit and the order requirements if the requirements of the order are not subsumed in the permit. Therefore, increased coordination between the permitting and enforcement programs will be critical to ensure that cleanups at these facilities are not hindered by poor coordination of these requirements.

Headquarters is developing an additional policy to address the relationship between post-closure permits and §3008(h) orders at closing facilities based on issues raised at the last branch chiefs meeting in Chicago. Please plan to discuss any comments you have on how the Agency can most effectively regulate the activity at these closing facilities at the next Branch Chiefs meeting. Headquarters is also considering the use of stipulated penalties in the compliance schedules in the permits to compel corrective action.

If you have questions or comments about the relationship between the permit and the order at a facility, please contact Susan Hodges in OWPE at (FTS) 475-9315 or Dave Fagan in OSW at (FTS) 382-4497. Also, see the attached March 8, 1988, memorandum on Use of the §3008(h) Orders or Post-Closure Permits at Closing Facilities for additional discussion on how the two authorities can be used.

Attachments

cc: Steve Botts, OECM
Fred Chanania, OGC
RCRA Permits Section Chiefs, Region I-X
RCRA Enforcement Section Chiefs, Region I-X



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APR 9 1989

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Use of §3008(h) Orders or Post-Closure Permits At
Closing Facilities

FROM: J. Winston Porter, Assistant Administrator

TO: Regional Administrators, Regions I - X

SUMMARY

The purpose of this memorandum is to clarify the use of §3008(h) orders and post-closure permits to address corrective action at closing interim status facilities. The first part of this memo briefly reviews the authorities and their applicability. The second part of this memo presents considerations that may be used in making your decision on whether to use a §3008(h) order or a post-closure permit with §3004(u) and §3004(v) conditions.

I. BACKGROUND

Many closing RCRA facilities require corrective action to mitigate potential threats to human health and the environment. Corrective action at environmentally significant closing facilities should be completed as expeditiously as possible.* Two principal authorities can be used to compel corrective action at these facilities: §3008(h) orders and post-closure permits.** Questions have arisen regarding which authority to use. In particular, advice has been sought on when to use a post-closure permit instead of §3008(h) order to compel corrective action at interim status facilities or facilities that have lost interim status.

*The Environmental Priorities Initiative (EPI) provides a priority-setting mechanism for identifying and evaluating environmentally significant facilities.

**Two other RCRA corrective action authorities, §3013 and §7003, may also be available. Additionally, Superfund authorities may also be applicable. Furthermore, these authorities may be used in combination.

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A. Section 3008(h)

Section 3008(h) authorizes EPA to issue corrective action administrative orders and to initiate civil actions for facilities currently under interim status, facilities that once had interim status, or facilities that should have had interim status. A §3008(h) order may be issued whether the facility is operating (prior to receiving a permit), is closing, or is closed.

Section 3008(h) orders may address releases or potential releases to all media. EPA may use these orders to require study or cleanup actions where the Agency has made the determination that there is or has been a release of hazardous waste or hazardous constituents into the environment from a facility. (Guidance on the interpretation of §3008(h) is provided in a December 16, 1985 memorandum from J. Winston Porter.)

B. Section 3004(u)

Section 3004(u) requires every treatment, storage or disposal facility that is seeking a RCRA permit after November 8, 1984 to undertake corrective action for releases of hazardous waste or hazardous constituents from solid waste management units (SWMUs), regardless of when the waste was placed in the unit involved. Section 3004(u) allows the use of schedules of compliance in the permit to accomplish corrective action.

C. Post-Closure Permits

Post-closure permits are required for any landfill, waste pile, surface impoundment, or land treatment unit which received waste after July 26, 1982, or which ceased the receipt of wastes prior to July 26, 1982 but did not certify closure until after January 26, 1983. However, a post-closure permit is not required if the unit closes by removal under standards equivalent to §264 standards.* Post-closure permits are also not required for treatment and storage units, although under the new tank regulations (51 FR 25422), post-closure permits may be required. For treatment and storage units, we

*Interim status units that closed by removal after January 26, 1983 under Part 265 standards are subject to post-closure responsibilities unless such units demonstrate that the facility meets the closure by removal standards of Part 264. (See December 1, 1987, 52 FR 45788 amending 40 C.F.R. §270.1(c)).

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recommend that a RCRA Facility Assessment (RFA) be completed and a §3008(h) order be issued, if necessary, before the operating permit is denied.

Under current regulations post-closure permits are required even where a facility has closed under interim status and a §3008(h) order has been issued to address corrective action. The terms of any §3008(h) order may, of course, be made part of the post-closure permit, as appropriate.

II. Considerations in Selecting §3008(h) Orders or Post-Closure Permits

As discussed above, there are situations in which only one authority is applicable. For example, for units not subject to post-closure care (e.g., interim status treatment and storage facilities or facilities with surface impoundments that have clean closed according to Part 264 standards), §3008(h) orders are the appropriate corrective action authority. In many cases, however, either authority may be used; e.g., interim status land disposal facilities subject to the post-closure care requirements.

Since §3008(h) and §3004(u) provide overlapping authority in terms of the scope and type of cleanup actions which may be required of interim status facility owner/operators, when a choice is available we leave the decision to the Regions to determine whether to use a §3008(h) order or §3004(u) conditions in an operating or post-closure permit. The following considerations are offered to assist you in deciding, on a case-by-case basis, how to proceed.

- o A post-closure permit may be an easier approach than a §3008(h) order in the case of a willing owner/operator. A §3008(h) order/judicial action may be the preferable first step where the owner/operator is uncooperative, or where there is disagreement with the Agency or uncertainty over the scope of activities to be conducted. (Some regions have found that the owner/operator may prefer a post-closure permit instead of a §3008(h) order because of the perceived stigma attached to an enforcement order.)

- o In situations which will require long-term oversight, it may be more appropriate to determine at the outset to use a post-closure permit instead of issuing a §3008(h) order. Permits are designed to address long-term activities. Enforcement authorities, which may involve judicial action and approvals, are less well-suited for activities requiring long-term oversight. (Of course, as noted above the cooperativeness of the owner/operator will influence this decision).

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o A §3008(h) order may be more appropriate where a prompt action is necessary and where a post-closure permit is not soon scheduled to be issued.* This is because §3008(h) orders allow more flexibility in both timing and scope than permits. For example, a §3008(h) order could focus only on the specific cleanup requiring immediate attention without having to address post-closure care or corrective action elsewhere on the facility. Conversely, a post-closure permit must address, to the extent necessary, releases from all SWMUs as well as post-closure care activities.

o A §3008(h) order may be more appropriate than a post-closure permit where there is concern that releases are coming from sources other than SWMUs. The language of section 3008(h) refers to releases from facilities. This may be broader language than that in section 3004(u) which refers to releases from SWMUs.

CONCLUSION

These considerations should be evaluated and weighed in any decision on which corrective action authority should be used. The Agency's objective for closing facilities is to minimize the post-closure release of hazardous wastes and hazardous constituents into the environment and to address corrective action for existing or potential releases at the time of closure. The post-closure permit provides a coordinated one-step mechanism for addressing corrective action at the entire facility together with post-closure care for regulated units. In the long-run, therefore, we anticipate that post-closure permits should serve as the routine mechanism for the majority of corrective actions at closing land disposal facilities. Under current regulations, use of §3008(h) will not obviate the need to issue a post-closure permit, unless closure by removal takes place and satisfies Part 264 standards as required under the new rules promulgated at 52 FR 45788. Hence, complementary use of both a §3008(h) order and a post-closure permit (with or without additional §3004(u) conditions added) remains an important option.

*If an imminent and substantial endangerment to health or the environment exists, a §7003 order may be appropriate.